

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 283 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

POPATBHAI GHUSABHAI

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioner

MR KAMAL MEHTA, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 16/03/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

The appellant-accused has filed this appeal against the judgment and order dated 11th March, 1991 passed by the Additional Sessions Judge, Junagadh in Sessions Case No.93/90. The learned Judge has held the appellant-accused ('accused' for short) guilty of

offences punishable under section 302 and 307 of Indian Penal Code and has sentenced him to suffer rigorous imprisonment for life and a fine of Rs.500/- in default rigorous imprisonment for two months under section 302 and rigorous imprisonment for seven years and a fine of Rs.1000/- in default rigorous imprisonment for one year under section 307 of Indian Penal Code.

Facts leading the prosecution of the accused are as under:

Nirmalaben, PW 5, had three sisters and was residing at Ginpara, Bagasara with her mother and deceased sister Vasantben. One sister has died and other sister had married. Vasantben was betrothed with the accused a month before the date of incident i.e. 2nd June, 1990. However as she was not agreeable with that relationship, the same was cancelled. Vasantben was serving in a private kindergarten in Bagasara. Nirmalaben was serving as a teacher in a private school at Godasana. On 2nd June, 1990 there being vacation, Nirmalaben was going to Bagasara by bus in the morning at 9.30. She was accompanied by Vasantben. They were travelling in a ST bus and had occupied seats in third line behind the driver. Bus was fully packed over to its capacity. On the way to Bagasara, when the bus just proceeded ahead from village Jambuda, at about 10.30 a.m., the accused rushed on Vasantben in the bus with open knife and inflicted blows on her indiscriminately. Nirmalaben having been intervened, she was also injured. Other passengers in the bus also came to her rescue. As the bus came to a halt, the accused ran out from the bus with the knife. Some of the passengers chased him and he was caught hold of from the field and was brought back in the bus and the bus was taken to Vasavadar Police Station from where it was taken to the Government Hospital. PSI, Vasavadar was present in the hospital who recorded the complaint of Nirmalaben, PW 5, and sent the same to Visavadar Police Station for registering the offence. Offence was registered under section 302 and 307 of the Indian Penal Code. On completion of the investigation, accused was chargesheeted in the court of the Judicial Magistrate, First Class, Visavadar who in his turn committed the case to the Court of Sessions for trial.

The learned Additional Sessions Judge framed charge against the accused. The accused pleaded not guilty and claimed to be tried. Prosecution led necessary evidence to prove the charge levelled against the accused. Accused has not led any evidence in defence and after hearing the advocates for the parties, the

learned Addl. Sessions Judge, held the accused guilty of offences referred to above and passed sentences mentioned above.

Learned counsel Mr A.D.Shah has challenged the order of conviction on the ground that the learned Addl. Sessions Judge has erred in accepting the identity of the accused duly proved beyond reasonable doubt by the prosecution. Mr Shah also contended that there is no evidence on record except the evidence of Nirmalaben, PW 5, whose evidence should not have been accepted by the learned Addl. Sessions Judge as she is an interested and related to the victim and her evidence is not corroborated by any sort of independent evidence. Mr Shah therefore, contended that the appeal should be allowed and the accused be set at liberty.

Learned Addl. Public Prosecutor Mr Kamal Mehta supports the judgment of the learned Addl. Sessions Judge. Mr Mehta contends that the identity of the accused has been established by the prosecution evidence beyond reasonable doubt. Mr Mehta contended that the sequence of events in the case establishes the identity of the accused. Mr Mehta contended that the evidence of Nirmalaben, PW 5, has been rightly accepted by the learned Judge and her evidence has been corroborated by independent evidence on record. Mr Mehta in the alternative contended that the evidence of Nirmalaben though related to victim is cogent, convincing and trustworthy. Mr Mehta further contended that simply because her evidence is not corroborated by complaint which is not duly proved does not make her substantive evidence either untrustworthy or unacceptable. Mr Mehta, therefore, contended that the appeal should be dismissed.

In the instant case, according to the prosecution case, the incident took place at about 10.45 a.m. in a bus. It is in evidence that the bus had a capacity of 56 passengers. However it was carrying 110 passengers. When the incident took place deceased Vasantben and Nirmalaben, PW 5, were sitting in the third seat behind the driver of the bus. All of a sudden, the accused came and inflicted blows on Vasantben. When Nirmalaben and other passengers had intervened, Nirmalaben was also injured while she tried to save Vasantben. There are as many as 18 injuries on the person of Vasantben and as many as 6 injuries on the person of Nirmalaben. As the incident took place in running bus, bus was stopped on the way. Taking advantage of the halting of the bus, the person who injured Vasantben and Nirmalaben came out of the bus with the knife and ran away. Some of the

passengers chased him and caught hold of him with the knife from a field away. He was brought back in the bus and the bus was taken to Visavadar Police Station where, according to the prosecution case, that person was handed over to the Police. Thereafter, the bus was taken to the hospital where Nirmalaben, PW 5, and Vasantben were admitted. So far as the panchas of arrest Panchnama of the accused are concerned, they have turned hostile. Therefore, that evidence is not with us to appreciate. Unfortunately, in this case, even the evidence of investigating agency is also very confusing and not clear on the point of arrest of accused at the Police Station on being produced by the passengers from the bus. However, the fact remains that accused was arrested. In his further statement, the accused has stated that he was arrested on that very day, however, in the afternoon from his village. It is not on record to show how far is village Bhatvavri from Visavadar or Bagasara or Jambuda. However, Visavadar is at a distance of about 14 k.m. from Jambuda where the incident took place. In Visavadar, PW 5, Nirmalaben and Vasantben were admitted. From there, they were taken to Junagadh and thereafter they were brought to Ahmedabad Civil Hospital where they were treated. However on 7th June, 1990, Vasantben succumbed to the injuries and died. Autopsy was performed by Dr.N.N.Parikh, PW 19 and cause of death shown is due to shock and haemorrhage due to sustained injuries. Defence has not disputed the homicidal death of Vasantben. Therefore, we do not enter into further discussion as to the cause of death.

PW 5 was also injured. She was first given treatment by Doctor at Visavadar who has issued certificate of injuries on her person at Ex.8. She was then removed to Junagadh and the doctor at Junagadh also issued certificate of her injuries at Ex.12. Though PW 5, Nirmalaben, was removed to Civil Hospital Ahmedabad and was treated there, necessary certificates were not brought on record. Thus, so far as the injury on the person of Nirmalaben, PW 5 is concerned, Ex.8 and Ex.12, certificates issued by the doctors at Visavadar and Junagadh are on record. We may make it clear that the injuries on the person of Nirmalaben are also not disputed by the defence. Therefore, non-production of injury certificate from the Civil Hospital does not assume any significance.

Real question required to be answered in this appeal is whether the evidence of Nirmalaben is acceptable and if so, whether the identity of the accused is established by the prosecution beyond reasonable

doubt. We would, therefore, like to refer to the evidence of Nirmalaben, PW 5. Nirmalaben, PW 5 has deposed that ".....bus started from village Jambuda by about 10.30 in the morning and when the bus moved for some time, accused Popot Ghusa started inflicting blows on Vasantben. I therefore intervened and I was also injured. I was injured on elbow of left hand, right side chest and left side of chest and belly. Vasantben became unconscious. Yet inflicting of blows continued. Then when Popat Ghusa felt that Vasantben will not survive, he tried to de-board the bus. When the bus came to a halt, Popat Ghusa started running away. Therefore, the passengers of the bus and persons in the adjoining fields caught hold of him and brought him in the bus. Thereafter, the bus was taken to Visavadar Police Station and police took Popat with knife to Visavadar Police Station and we both sisters were taken to hospital. The case of Vasantben was serious one. She was taken to Junagadh. I was also taken to Junagadh later on. No one had accompanied us when were taken to hospital. We were unconscious. Therefore, we do not know who had come. I was given treatment at Visavadar hospital and then my complaint was recorded. I dictated the complaint which was taken down as per my dictation. My signature was taken thereon. The complaint was not read over to me. I was shown the complaint which bears my signature. It is Ex.20." In the cross-examination, she has deposed that "..... Vasantben asked for water in the bus and again she became unconscious. She was some time conscious and some time unconscious in Visavadar Hospital. When I was admitted in Junagadh hospital, police had completed the police statement. I became unconscious after I reached Junagadh. Thereafter, I was some time conscious and some time unconscious till I reached Ahmedabad. I do not know what happened after I reached Junagadh hospital. Whenever I gained consciousness, I looked at Vasant. At that time, she was some time conscious and some time unconscious. I some time became unconscious and regained consciousness on the way from Junagadh to Ahmedabad. Vasant also regained consciousness and became unconscious on the way."

Relying on this part of evidence in examination in chief as well as cross-examination, learned advocate Mr Shah contended that PW 5 was unconscious or was not in fit state of mind either to give her complaint or her dying declaration recorded by the Deputy Mamlatdar. It is clear from her evidence that her complaint was recorded at Visavadar and her dying declaration was recorded at Junagadh. When she herself had admitted in

the cross-examination that she became unconscious on reaching Junagadh and she does not know what happened at Junagadh, it will be difficult to rely on or seek corroboration from the alleged dying declaration which at the most can be said to be a previous statement of Nirmalaben. We, therefore, do not accept the contention of Mr Mehta that the statement recorded by the Deputy Mamlatdar at Junagadh can be used as a piece of corroborative evidence to the evidence of Nirmalaben.

Mr Shah contended that the complaint Ex.20 is not duly proved in accordance with law and therefore, though exhibited it cannot be read in evidence. PW 5, Nirmalaben, as referred to above, has stated that the complaint was taken down as per her say and she signed the same. Though she admitted her signature below the complaint, she has stated that the same was not read over to her. Question is, if a complaint recorded if not read over to the witness yet the same is signed, can it be said to be proved in evidence ? Not only that she is required to be read over the complaint, she has to admit that the contents are true. It is true that in the examination in chief of PW 5 she has not stated that the complaint was not read over to her. However, before the Court also, the same is not read over to her and she has not admitted that the contents are true. However, in the cross-examination, she has denied that Ex.20 was not dictated by her and it was written at the dictation of a relative and her signature was obtained. The complaint is not duly proved in accordance with law. In our opinion, it has been wrongly exhibited. When a document, particularly complaint in the instant case, is not duly proved then, it only assumes the character of a statement before the Police. Assuming that it is a statement before the police, then also no contradictions are brought on record and duly proved by the defence. One can assume that there are no contradictions in the evidence of this witness so far as her police statement is concerned.

This brings us to consider whether the evidence of Nirmalaben, PW 5, as it stands before the Court can be relied upon to prove the charge levelled against the accused and the identify of the accused. Even if the complaint Ex.20 would have been duly proved, then also it is not a substantive piece of evidence. Substantive piece of evidence is the evidence deposed by the witness before the Court. The witness has stated that she was injured by the accused at six places, i.e. on the elbow of left hand, left side of chest, right side of chest and belly. If we refer to Ex.8, it refers to as many 4

injuries which are as under:

- "1. Fresh incised wound about cm. x 1 cm. x (? Cavity deep) oblique from above downwards and laterally on back of (Lt) chest 5 cm. away from midline on middle part. Margins and edges clean cut.
2. Fresh I.W. of about 3 cm. x 1 cm. x (? cavity deep) on (Lt) side chest anteriorly about 5 cm. below clavicle about 8 cm. away. Direction oblique from above downwards and medially. Margins and edges clean cut.
3. Fresh I.W. of about 4 cm x 1 cm. x (? cavity deep) below (Lt) breast. Transverse in direction. Margins and edges clean cut.
4. Fresh I.W. of about 2 cm. x 1 cm. x muscle deep transverse about 4 c.m above elbow joint posteriorly."

Ex.8 is a certificate issued by Doctor at Visavadar, PW 1. PW 2, Doctor at Junagadh had also examined Nirmalaben and has issued certificate Ex.12. There, the injuries shown are as under:

1. Stitched wound size about 2 c.m. below left clavicular region. Local tenderness present.
2. Stitched wound size about 3 cm. of epigastric region.
3. Stitched wound size 2 cm. on left scapular region.
4. Stitched wound size about 2 1/2 cm. left arm.
5. Sharp cutting wound size 1/2 x 1/2 x 1/2 cms of left elbow joint posteriorly.
6. Sharp cutting size 1 x 1/2 x 1/2 cm. left muscle rt. elbow region.
7. Sharp cutting wound size 2 x 1/2 x deep to muscle of rt. gland below it.

If we read Ex.8 and Ex.12, the same corroborate the evidence of Nirmalaben, PW 5 on the question of injuries on her person. According to Nirmalaben, PW 5, she was

injured at the time when she intervened to save Vasantben who was assaulted in the bus. Injuries on the person of Vasantben are also proved through the evidence of PW 1, PW 2, doctors at Visavadar and Junagadh as well as PW 19, Doctor at Ahmedabad.

This brings us to the question whether these injuries are caused by the accused or someone else. It is in evidence of PW 5 that when the accused tried to run away from the bus with knife, some passengers of the bus and some field owners chased him and caught hold of him and brought him back to the bus and the bus was taken to Visavadar Police Station where the accused was handed over to the Police. The question is whether the person who was handed over to the Police is the accused before the Court or he was someone else and the accused was arrested from his residence as stated by him in further statement from his village in the afternoon. PW 5 and deceased Vasantben are the residents of village Bagasara. It is not disputed by the defence that Vasantben was betrothed with the accused a month before and the same was cancelled. It is in evidence of PW 5 that she knew the accused prior to the incident. What is disputed by the defence is whether Nirmalaben had seen the accused or not. When PW 5, Nirmalaben got injured while intervening to save Vasantben, it cannot be said that she must not have seen the assailant. She was injured on the chest portion and belly portion which, in our opinion, cannot be caused unless the person is in front side. So there was ample opportunity and time for Nirmalaben, PW 5, to see the assailant. When Nirmalaben has given the name of the accused as the assailant and the assailant is arrested, the short question is whether the name given by Nirmalaben is really given by her or given by someone else. Unfortunately, the Addl. Public Prosecutor who handled the trial has not been careful enough to see that the complaint has been properly proved in accordance with law. The complaint, from the character of being a complaint now assumes the character of a statement before the Police. The case of the defence is that the complaint was dictated at the instance of some relative of Nirmalaben, who had come there. At which point of time the complaint is recorded is proved by the prosecution by the evidence of PW 20 PSI Kishoresinh. He has stated before the Court that " on 2nd June 1990, I was discharging my duty as PSI in Visavadar Police Station. In morning of that day, Nirmalaben had come for treatment and I recorded her complaint and sent it to Visavadar Police Station for registration". It is suggested in the cross-examination that the maternal uncle of PW 5 had dictated the complaint. The suggestion

is to the effect that the brother of the accused had filed a complaint against the maternal uncle of PW 5. It is not on record as to show nature of the complaint and the date when the incident took place and such other details. Therefore, this suggestion, in our opinion, are only suggestions without having any effect to the prosecution. The incident took place in a bus between 10.30 and 10.45 a.m. immediately after the bus proceeded from Jambuda to Visavadar. Visavadar is at a distance of 14 k.m. from Jambuda. Both the injured, viz. PW 5 and the deceased were admitted in Visavadar hospital at 11.00 a.m. and Vasantben was sent to Junagadh by 11.45 a.m. From the evidence of PW 2, Doctor at Junagadh, it is clear that Vasantben and Nirmalaben were shifted to Junagadh Hospital. It is clear that before 11.45 in the morning, i.e. before Vasantben was shifted to Junagadh hospital, offence must have been registered and name of the accused was disclosed. Though the panchas of arrest of the accused have turned hostile, the fact remains that the accused was arrested on that day. The question is whether he was arrested when the bus reached at Visavadar or whether he was arrested in the afternoon from his residence. Except the bare version of the accused that he was arrested from his residence in the afternoon on 2nd June, 1990, there is nothing on record to show that he was in his village even prior to that time. From the evidence of PW 20, it emerges that he was arrested on 2nd June, 1990 and from the chargesheet it is clear that he was arrested at 12.00 noon. Panchas of arrest of the accused have turned hostile. The fact of arrest of the accused at 12.00 noon is not challenged by the defence in evidence of PW 20. Therefore, in our opinion, we will accept the evidence of PW 20 to the effect that the accused was arrested at 12.00 noon and not as stated by the accused in his further statement in the afternoon of 2nd June, 1990. In view of these facts, the evidence of PW 5 is rightly accepted by the learned Addl. Sessions Judge. To say that because of cancellation of betrothal, there was enmity and PW 5 and the maternal uncle of PW 5 has wrongly roped in the accused cannot be accepted. The assailant of Vasantben and PW 5 was caught hold of by the co-passengers of the bus and was handed over to the Police. There was no reason for PW 5 to let go the real assailant and accept the act of Investigating Agency to bring in the accused. We are, therefore, not convinced with the defence of the accused.

In the morning at about 10.40 in a bus though having capacity of 56 passengers and carrying 110 passengers, the incident took place in which two sisters were assaulted by one person and one of the sisters

survives and when she identifies the man, we do not find any reason to reject that part of her evidence. It is our misfortune that despite such evidence, the witnesses have turned hostile in the case. It appears that the prosecuting agency has conducted the matter in a most casual and irresponsible manner. No necessary precautions were taken to prove certain facts which could have been proved very easily with little diligence of the learned Public Prosecutor at the trial. With this note, we do not find any reason to interfere with the order passed by the learned Addl. Sessions Judge.

In the result, the appeals fails and is dismissed.

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(vjn)